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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1980

No. 61504

STATE OF MISSOURI,
Petitioner,

v.

DENNIS LEE MORGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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INDEX

Opinion Below 1
Jurisdictional Statement 2
Questions Presented 2
Constitutional and Statutory Provisions Involved 3
Statement of the Case 4
Reasons for Granting the Writ 5
Conclusion 14
Appendix A—Opinion, Supreme Court of Missouri A1
Appendix B—Relevant Missouri Statutes A26
Appendix C—Relevant Michigan Statutes A30

Table of Authorities

Cases Cited

Bell v. *United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); 13
Blockburger v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); 6, 8, 10, 11, 12, 13
Brintley v. *Michigan,* .... U.S. ...., 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); 2, 6, 7, 8
Brown v. *Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); 9, 10
Ebeling v. *Morgan,* 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1151 (1915); 12
Ennis v. *State,* 364 So.2d 497 (Fla. App. 1978); 9
Gavieres v. *United States,* 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911); 12
Gore v. *United States,* 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958); 12
Harris v. *Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); 3, 4, 7, 8, 10

Harris v. *State*, 555 P2d 76 (Okla. Crim. App. 1976) ..10, 11

Harris v. *United States*, 359 U.S. 19, 79 S.Ct. 560, 3 L.Ed.2d 597, *rehearing denied*, 359 U.S. 976, 79 S.Ct. 873, 3 L.Ed.2d 843 (1959); 12

In re Neilson, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889); 11

Jeffers v. *United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); 9

Ladner v. *United States*, 358 U.S. 169, 75 S.Ct. 209, 3 L.Ed.2d 199 (1958) 9

Mandel v. *Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); 7

Milanovich v. *United States*, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961); 13

North Carolina v. *Butler*, ... U.S. ...., 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); 8

Oregon v. *Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); 7

Prince v. *United States*, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957); 13

Sours v. *State*, No. 61458 (Mo. banc January 15, 1980); 5, 8

State v. *Chambers*, 524 S.W.2d 826 (Mo. banc 1975); . 4

State v. *Morgan*, No. 39358 (Mo.App., E.D. May 9, 1979); 4

State v. *Morgan*, No. 61504 (Mo. banc January 15, 1980); 2, 3, 4, 5, 6, 8, 9, 11, 14

State v. *Whitley*, 382 S.W.2d 665 (Mo. 1964); 8

Vanetzian v. *Hali*, 562 F.2d 88 (1st Cir. 1977); 9

Whalen v. *United States*, 379 A.2d 1152 (D.C.Ct.App., 1977); 11

Statutes Cited

District of Columbia Felony Murder Statute 11
District of Columbia Rape Statute 11
Rule 83.09, V.A.M.R. 4
Section 559.020, RSMo 1969 .....2, 3, 4, 5
Section 559.225, RSMo Supp. 1976 5
Section 560.135, RSMo Supp. 1975 5
Section 560.156, RSMo 1969 .....2, 3, 4
Section 560.160, RSMo 1969 .....2, 4, 5
Section 750.227(b), M.C.L.A. 2, 3, 6
26 Crim.L.Rep. 4032—*Whalen* v. *United States,* No. 78-5471 12
26 Crim.L.Rep. 4113 .....6, 12

Constitutional Provisions Cited

United States Constitution, Fifth Amendment 3
Article V, Section 10, Missouri Constitution 4

Articles Cited

"Consecutive Sentences in Single Prosecutions, Judicial Multiplication of Statutory Penalties," 67 *Yale Law Journal* 916 (1958) 13
"Notes and Comments; Twice in Jeopardy,: 75 *Yale Law Journal,* 262 (1965) 12

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1980

No. 61504

STATE OF MISSOURI,
Petitioner,

v.

DENNIS LEE MORGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioner, the State of Missouri, prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in the above-entitled cause on January 15, 1980.

OPINION BELOW

The opinion of the Supreme Court of Missouri, as yet unreported, is styled and numbered as follows: State of Missouri, Respondent, v. Dennis Lee Morgan, Appellant, No. 61504, In the Supreme Court of Missouri, en banc. A copy of the opinion is reprinted as Appendix A.

JURISDICTIONAL STATEMENT

Judgment was entered in this cause by the Supreme Court of Missouri on January 15, 1980. On February 11, 1980, the Supreme Court overruled both respondent's Motion to Stay Mandate and respondent's Motion for Rehearing. The present petition is filed within ninety (90) days of the entry of judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Whether the Missouri Supreme Court's decision in *State* v. *Morgan,* No. 61504 (Mo. banc January 15, 1980), wherein the Court held that, convicting respondent in a single proceeding of both the underlying felony (stealing over $50, § 560.156 and § 560.160, RSMo 1969) and the "greater offense" (second degree murder, felony murder, § 559.020, RSMo 1969) violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision on the merits regarding the same federal Constitutional issue rendered in *Brintley* v. *Michigan,* .... U.S. ...., 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), wherein this Court dismissed, for want of a substantial federal question, petitioner's appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant separately of both the "greater offense" (possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.) and the underlying felony (armed robbery, § 750.593, M.C.L.A.), even though all proofs required to establish violation of the latter are necessarily required for proof of violation of the former.

2. Whether imposition of concurrent sentences for second degree murder, felony murder, and for the underlying

felony, in a single sentencing proceeding following a single trial, violates the double jeopardy clause of the Fifth Amendment to the United States Constitution.

3. Whether the holding of *Harris* v. *Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); to wit, that

> "[A] person [who] has been tried for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense," 433 U.S. at 683.

mandates the result reached in *State* v. *Morgan,* No. 61504 (Mo. banc January 15, 1980); to wit, that conviction in one proceeding of both felony murder and its underlying felony violates the double jeopardy clause to the Fifth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in active service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

Sections 560.156, 560.161, 559.010, 559.020, 559.040, 559.050, and 559.070, RSMo 1969, are set forth in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set forth in Appendix C.

STATEMENT OF THE CASE

After being convicted of both second degree murder (felony murder), § 559.020, RSMo 1969, and stealing over $50, §§ 560.156 and 560.160, RSMo 1969, respondent was sentenced to served ten (10) years imprisonment on each count, said sentences to run concurrently. Respondent then appealed his convictions to the Missouri Court of Appeals, Eastern District, said convictions having been affirmed by that court in a decision styled *State* v. *Morgan,* No. 39358 (Mo.App., E.D. May 9, 1979). Respondent's case was then ordered transferred to the Missouri Supreme Court, pursuant to Art. V, § 10, Constitution of Missouri; and Rule 83.09, V.A.M.R., which provides that causes transferred to the Missouri Supreme Court are to be determined by that court in the same manner as if the case were on original appeal.

The Missouri Supreme Court, in its opinion styled *State* v. *Morgan,* NO. 61504 (Mo. banc January 15, 1980), citing *Harris* v. *Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), held that:

> "Inasmuch as the convictions and sentences for the greater offense of felony murder and the lesser included offense of the felony, stealing, violate the Fifth Amendment proscription against double jeopardy, the judgments are vacated and the cause is remanded to the trial court with directions to enter a new judgment and sentence consistent with the views expressed herein [footnote omitted]." *slip op.* at 22.

It is from that decision, reversing the well-established rule in this jurisdiction found in *State* v. *Chambers,* 524 S.W.2d 826 (Mo. banc 1975), that petitioner seeks this Court's review.

REASONS FOR GRANTING THE WRIT

In its January 15, 1980, opinion, holding that respondent's conviction in a single proceeding for both second degree murder (felony murder), § 559.020, RSMo 1969, and the underlying felony of stealing over $ 50, §§ 560.156 and 560.160, RSMo 1969, violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, the Missouri Supreme Court was careful to point out that appellant's convictions did not fall within the state's constitutional proscription regarding double jeopardy. *State* v. *Morgan,* No. 61504 (Mo. banc January 15, 1980). That same day, the Missouri Supreme Court adopted the same reasoning in its reversal of an armed-criminal-action conviction in a case wherein the defendant, in the same proceeding, had been charged with, and convicted of, first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976. *Sours* v. *State,* No. 61458 (Mo. banc January 15, 1980) (petition for Writ of Certiorari is pending before this Court). In both cases, the Missouri Supreme Court found that convicting the defendants in a single proceeding of both the underlying felony (stealing over $50, in the instant case, and first degree robbery, in *Sours*), and the "greater offense" (second degree murder, felony murder, and armed criminal action) violates the double jeopardy clause of the Fifth Amendment to the United States Constitution because the proof of the underlying felony in each case was necessary to prove the "greater offense."[1] The court reached its conclusion by reasoning

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1. It should be noted that, prior to *Morgan,* Missouri Courts had never used the "greater-lesser included offense" analysis with regard to felony murder-double jeopardy issues. See *Chambers, supra; State* v. *Hicks,* 530 S.W.2d 396 (Mo.App., St.L.D. 1975); *State* v. *Johnson,* 549 S.W.2d 627 (Mo.App., K.C.D. 1977); *State* v. *Jasper,* 486 S.W.2d 268 (Mo. banc 1972); and *State* v. *Moore,* 326 Mo. 1199, 33 S.W.2d 905 (1930).

that the test prescribed by *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), as applied in *Harris* v. *Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), relegates the underlying felony to "lesser included offense" status.

Petitioner submits that a Writ of Certiorari should issue in the case at bar for the reason that the Missouri Supreme Court's holding in *State* v. *Morgan, supra,* conflicts with a recent decision of this Court summarily dismissing an appeal for want of a substantial federal question. *Brintley* v. *Michigan,* .... U.S. ...., 100 S.Ct. 418, 62 L.Ed.2d 317 (1979). The question, which *Brintley* had sought to present, was as follows:

> "Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, § 750.227(b), proscribing possession of firearm during commission of felony, and for (armed robbery in one case and second degree murder in another) where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of § 750.227(b), where there is no evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony element of firearms possession charge, and where (in armed robbery case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies?" 26 Crim.L.Rep. 4113.

Although *Brintley* dealt with a felony committed by use of a firearm and its underlying felony, the issue which the defendant sought to present to this Court is identical to the issue raised in *Morgan, supra;* to wit, does it constitute double jeopardy in violation of the Fifth Amendment to the United States Constitution to charge and con-

vict of two offenses in a single proceeding, where all proofs required to establish a violation of the underlying felony are necessarily required for proof of the violation of the "greater offense."

Respondent submits that a summary disposition, such as in *Brintley* v. *Michigan, supra* is a disposition on the merits. Such a disposition rejects the specific challenges presented in the Statement of Jurisdiction and leaves, undisturbed, the judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). While summary actions should not be understood as breaking new gruond, they do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. *Mandel* v. *Bradley, supra.*

Petitioner submits that this Court's desision in *Brintley* clarifies the breadth of *Harris.* If this Court had intended for *Harris* to be applied to situations other than cases where there have been separate prosecutions, then certainly this Court would not later dismiss an appeal wherein the issue was identical except for the fact that it involved a single prosecution. *Harris, supra,* and *Brintley, supra,* raised identical legal issues but diverge, petitioner submits, because the latter involved a single prosecution and the former, multiple prosecutions.

The Missouri Supreme Court's attempt to expand on a federal Constitutional right conflicts with this Court's opinion rendered in *Oregon* v. *Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), wherein the Court stated:

> "[A] state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards [citations omitted] But, of course, a State

> may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Id.* U.S. at 719.

See also *North Carolina* v. *Butler,* .... U.S. ...., 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Petitioner submits that, although *Brintley* dealt with the use of a firearm during the commission of a felony and its underlying felony, the legal issue is identical to that raised in the case at bar. That this is true is highlighted by the fact that the Missouri Supreme Court used this Court's decision in *Harris* v. *Oklahoma, supra,* a case involving felony murder-double jeopardy, to reverse *Sours* v. *State, supra,* a case involving armed criminal action-double jeopardy. It would, therefore, follow that a United States Supreme Court decision dealing with armed criminal action-double jeopardy which conflicts with a state supreme court decision dealing with felony murder-double jeopardy, should be controlling.

Notwithstanding the aforementioned, petitioner contends that the Missouri Supreme Court's decision overlooked the basic fundamentals of double jeopardy. In *Morgan,* not only were two crimes charged, but each crime was perpetrated against a different victim. The victim of the stealing was not also the victim of the murder. The fact that each crime was perpetrated against different victims should be sufficient for purposes of meeting the *Blockburger* standard in that separate victims constitute separate elements and, thus, separate units of prosecution. Indeed, the Missouri Supreme Court recognized this in *State* v. *Whitley,* 382 S.W.2d 665 (Mo. 1964). Petitioner can find no precedent for invoking double jeopardy in a situation wherein the crimes charged were perpetrated against separate victims. This is not a case wherein the same act of force resulted in victimizing two individuals

as was the case in *Ladner* v. *United States*, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958), wherein this Court held that a single discharge from a shotgun, wounding two federal officers, was but one assault. This is simply a case wherein two individuals, unknown to each other, were victimized, miles apart, as a result of the criminal inclinations of one person.

Petitioner further submits that, whatever may have been required to be proved in the particular circumstances of this case, stealing over $50 and second degree murder (felony murder) are not the "same" offense for purposes of determining double jeopardy as it is not ordinarily necessary to commit the former offense in order to commit the latter. A greater offense will invariably require proof of every fact necessary to show the lesser included offense as well as proof of one or more additional elements. See *Jeffers* v. *United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); *Brown* v. *Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Under Missouri's Second Degree Murder Statute (which makes all other kinds of murder at common law, other than first degree murder, manslaughter, or justifiable or excusable homicide, murder in the second degree), neither stealing over $50 nor any other felony at common law is a necessarily included offense of felony murder since proof of any of those felonies is sufficient to support a felony murder conviction. Put another way, the statute does not require that stealing over $50 need always be proven in order to secure a conviction for murder committed in the course of a felony. See *Ennis* v. *State*, 364 So.2d 497, 499 (Fla.App. 1978) (See *Vanetzian* v. *Hall*, 562 F.2d 88, 89-90 (1st Cir. 1977)). Petitioner contends that none of the decisions, cited by the Missouri Supreme Court in its opinion in *Morgan*, supports the argument that the underlying felony and the felony murder are the "same" offense. In *Brown* v. *Ohio*, *supra* (the

main case relied on in *Harris* v. *Oklahoma, supra*), the United States Supreme Court held that, once the defendant had been convicted and punished for the offense of "joyriding," *i.e.*, taking or operating an automobile without the owner's consent, he could not thereafter be tried for theft of the auto. The court noted that "joyriding" was, under Ohio law, a lesser included offense of auto theft. 432 U.S. at 163-164, 167. Because each offense did not require "proof of a fact that the other does not . . ." *Brown* v. *Ohio, supra* at 432 U.S. at 167, quoting *Blockburger* v. *United States, supra,* 284 U.S. at 304, the offenses were the "same." This Court held that the trial court had erred in overruling Brown's objection that the double jeopardy clause barred a trial for the auto theft following his trial and conviction for "joyriding." See 432 U.S. at 163-164.

While *Harris* v. *Oklahoma, supra,* is somewhat more pertinent, it does not confirm the Missouri Supreme Court's view of the *Blockburger* test. Harris was convicted of felony murder, arising out of an armed robbery. He was then charged, in a second prosecution, with the armed robbery. Prior to trial, he moved to dismiss the information, asserting that, under the double jeopardy clause, his earlier conviction barred any subsequent trial for an armed robbery. *Harris* v. *State,* 555 P.2d 76, 78 (Okla.Crim.App. 1976). This motion was denied, and Harris was tried, convicted and sentenced to thirty (30) years imprisonment. *Id.* at 77. This Court reversed, in a *per curiam* opinion, holding that:

> "[w]hen, as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the double jeopardy clause bars prosecution for the lesser crime after conviction for the greater one." 432 U.S. at 682.

But this Court did not expressly hold that robbery and murder were the "same" offense under the *Blockburger*

test; indeed, the brief opinion in *Harris* did not even cite the *Blockburger* decision. Instead, the court relied primarily on *In re Neilson,* 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889), which, like all the other cases cited in *Harris,* involved multiple prosecutions.

Petitioner contends that, succinctly stated, *Harris* establishes that, had he (Harris) been previously convicted or acquitted of the felony murder, he could not thereafter been tried for the robbery that formed the predicate for the murder conviction.

In its opinion in *Morgan,* the Missouri Supreme Court stated that the determination of legislative intent is an exercise, independent of the *Blockburger* test, and, therefore, said test is not a rule of statutory construction. Petitioner submits that, even if that court's interpretation of how the *Blockburger* test should be applied is assumed, said test is not triggered until, and unless, it cannot be determined that the legislative intent was to punish the crimes separately.

In this regard, it is interesting to note the case of *Whalen* v. *United States,* 379 A.2d 1152 (D.C.Ct.App., 1977), wherein the court held that the imposition of consecutive sentences for first degree murder and for the rape that was charged and proved as the predicate felony, was proper because, even if the rape is considered an "element" of the felony murder, the two offenses do not merge upon conviction because the two statutes were designed to protect separate societal interests; and the two offenses were sufficiently distinct. That court refused to analyze, solely by abstract consideration, the statutes involved but looked instead to the societal interests protected by the statutes under consideration. It held that the societal interests, which Congress sought to protect by enactment of the District of Columbia Felony Murder Statute and Rape Statute, were separate and distinct. It reasoned that the rape stat-

ute was promulgated to protect women from sexual assault, while the felony murder statute purports to protect human life. *Whalen, supra* at 1159. The *Whalen* case is currently pending before this Court, styled *Whalen* v. *United States*, No. 78-5471, 26 Crim.L.Rep. 4032. See summary of the argument before this Court on November 27 and 28, 1979, at 26 Crim.L.Rep. 4113.

Worthy of this Court's consideration is: "Notes and Comments; Twice in Jeopardy," 75 *Yale Law Journal*, 262 (1965), which states in part as follows:

> "When the legislature clearly indicates in a statute its intent with respect to the cumulation of convictions, the court's task of construction is at an end and if legislative intent, though not proclaimed in the statute, is nonetheless perfectly clear from the legislative history, the legislature's purpose should be honored. But in the vast majority of cases, unequivocal legislative intent cannot honestly be found in the statute or its official history. Thus, the court must ordinarily resort to presumptions about legislative intent—canons of construction—to determine the unit of conviction created by a statute."

It should be noted that several cases is the *Blockburger* line do not clearly indicate that the use of tests of statutory construction is called for only when legislative intent is unclear. *Ebeling* v. *Morgan*, 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1151 (1915); *Harris* v. *United States*, 359 U.S. 19, 79 S.Ct. 560, 3 L.Ed.2d 597, *rehearing denied*, 359 U.S. 976, 79 S.Ct. 873, 3 L.Ed.2d 843 (1959); *Gore* v. *United States*, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958); and *Gavieres.* v. *United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911). However, in each of these cases, legislative intent was not at all apparent in the criminal-sentencing statutes in question. Thus, it is implicit in these

cases that the use of a "same offense" defining test, same as that found in *Blockburger,* is to be resorted to by the courts only when there is an absence of an indication of legislative intent.

It is apparent that there is some confusion surrounding *Blockburger* and other multiple-punishment cases (although concurrent sentences were imposed in the instant case, the Missouri Supreme Court apparently construed such as a multiple-punishment case), but, as indicated in "Consecutive Sentences in Single Prosecutions, Judicial Multiplication of Statutory Penalties, 67 *Yale Law Journal* 916, 920 (1958), "much of the confusion in multiple-punishment cases is directly attributable to use of traditional double jeopardy tests." It is argued in this article that "the legislature is the ultimate authority for imposition of punishment." *Id.* at 923, and that "the legislature may, consonant with legitimate penological principles, authorize consecutive sentences when a single act may violate several statutory provision." *Id.* at 919-920. With a specific reference to the *Blockburger* test, the article states,

> "Acting in a context which limits the punishment by the will of the body that defines crime, courts in multiple-convictions cases should abandon automatic and inappropriate application of the same evidence test and focus on legislative intent instead." *Id.* at 931.

Petitioner submits that there exists no precedent for the proposition that the *Blockburger* test must be applied in the case at bar. In fact, there have been several multiple-punishment cases decided solely on the basis of legislative intent without reference to tests of statutory construction. *Prince* v. *United States,* 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957); *Bell* v. *United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); and *Milanovich* v. *United States,* 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961).

In *Morgan, supra,* the Missouri Supreme Court used certain tests of statutory construction to override, what petitioner submits was, the clear expression of legislative intent to convict and punish for both felony murder and its underlying felony. Petitioner respectfully submits that the Missouri Supreme Court has misconstrued the essence of the Fifth Amendment's double-jeopardy guarantee.

Because a definitive decision by this Court is long overdue concerning whether or not convictions can be had and punishment imposed for both felony murder and its underlying felony and, further, because there exists decisions of this Court, conflicting with the Missouri Supreme Court's decision in *State* v. *Morgan, supra,* it is respectfully requested that this Court grant full review of this issue so as to resolve the confusion still prevailing, not only in the State of Missouri, but within every jurisdiction within this country.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MISSOURI,
Respondent,
vs.
DENNIS LEE MORGAN,
Appellant.

No. 61504

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
HONORABLE LACKLAND H. BLOOM, JUDGE

Appellant was convicted in one trial of stealing over $50 and second degree (felony) murder. The victim was killed when the car in which she was a passenger was struck by a car driven by appellant, who was seeking to elude police in a high-speed chase. The stealing had occurred earlier when appellant pulled into a gasoline station and engaged the attendant in conversation about the car while a companion, never seen by the attendant, entered the storage room of the station and stole some cigarettes, a check protector and some quarters.

The Court of Appeals, Eastern District, affirmed appellant's convictions,[1] after which this Court granted transfer and now decides the case as an original appeal.

Seven claims of error are lodged here. Appellant contends that the trial court erred in (1) denying his motion

1. Although this Court reaches a different conclusion as to the double jeopardy issue presented here and in the court of appeals, it concurs in the results reached by Crist, J. as to the other issues involved and adopts his reasoning without use of quotation marks in several parts of this opinion.

to dismiss on the ground that the two counts in the substitute information subjected him to double jeopardy; (2) denying his motions for acquittal because there was insufficient evidence of stealing; (3) limiting defense counsel's cross-examination of one of the police officers; (4) denying his motion to suppress evidence seized without a warrant at the scene of the wreck; (5) submitting a verdict-directing instruction that varied from the substitute information; (6) failing to give in full MAI-CR 2.70 as required, and (7) overruling defense objections to testimony by the station attendant as to the value of cigarettes stolen and failing to declare a mistrial after sustaining defense counsel's motion to strike testimony as to the value of the check protector, thus prejudicing appellant's right to a fair trial.

The state's evidence established the following: On December 4, 1975, a man identified by the station attendant as appellant drove into the Clark Service Station on South Grand in St. Louis and asked the attendant to check the oil. The attendant described the car as a black over white Cadillac, although his testimony varied on whether it was a two-door or four-door car and he did not know the model of the car. When the attendant told appellant that the oil was fine, appellant then asked the attendant to listen for a knocking noise in the engine. The attendant estimated that the encounter lasted between five and ten minutes. He testified that during that time appellant never got out of the car and that he saw no one else in the car or around the station. When the attendant returned to the station building after appellant had left, he saw that the door to the storage room was open, a bag of cigarettes lay open and some loose change was on the floor. The attendant then called the police. One of the policemen involved in the chase testified that he and his partner were out on routine patrol and began following the Cadillac appellant was driving after a call came over their radio on a holdup at the Clark

station. The call included a description, although what the description was is unknown. Very soon after the call, the officer and his partner observed the Cadillac approaching with two persons inside. The driver was a black male, and as the police passed, one officer testified that the driver put his hand up to his face so as to obstruct their view of him, while the passenger in the Cadillac appeared to be doing something down on the seat. After following the Cadillac about half a block, another call came out over the police radio with a description of the automobile and its occupants. At that time the policemen accelerated and turned on the red roof lights and siren. The Cadillac also accelerated at this point, and the chase ending in the fatal crash ensued. After the crash and while the appellant and his companion were subdued, the front seat of the car was searched for weapons. None was found. At some point after ambulances and other police cars had arrived, one of the officers had a radio conversation with the attendant or manager of the service station and told him he had found a carton of cigarettes in the car. The attendant or manager told him more cartons had been stolen. The officer returned to the Cadillac and opened its trunk by means of a remote switch in the glovebox. There he found thirteen cartons of cigarettes and a check protector. Fingerprints on one carton and the check protector were identified later as belonging to appellant. Apparently, appellant was in the ambulance at the time of the trunk's search.

The complexity of the first issue presented, double jeopardy, requires a detailed analysis of this case vis à vis Missouri and United States Supreme Court cases on this issue. Appellant relies primarily on Harris v. Oklahoma, 433 U.S. 682 (1977) to support his claim of double jeopardy here. A superficial comparison of this case and *Harris* yields the conclusion that the two cases are distinguishable. In *Harris* a grocery store clerk was shot and killed by a

companion of Harris in the course of a robbery. Harris was convicted of robbery under an Oklahoma statute. Thereafter Harris was brought to trial and convicted on a separate information charging felony-murder also under an Oklahoma statute.[2] His motion to dismiss on the ground that this prosecution violated the Double Jeopardy Clause of the fifth amendment was denied. The United States Supreme Court reversed, saying, "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater crime." In a footnote to this sentence the court said the state had conceded that in the murder case it was necessary for all the ingredients of the underlying felony of robbery with firearms to be proved. The distinction between *Harris* and the instant case is that in *Harris* there were two trials and in this case there was one. This cannot be the end of the analysis, however, for several reasons.

The fifth amendment to the United States Constitution states in pertinent part: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . ." U.S. Const. amend. V.[3] The United

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2. Although the opinion in Harris v. Oklahoma, 433 U.S. 682 (1977), relates that Harris first was convicted of felony murder, then tried and convicted of robbery, the underlying cases in the Oklahoma state courts indicate that the opposite was true. *See*, Harris v. State, 558 P.2d 1199 (Okla. Cr. 1977) and Harris v. Oklahoma, 439 U.S. 970 (dissenting opinion by Brennan, J.) (1978).

In either event, Brown v. Ohio, 432 U.S. 161 (1977), had made clear that the order of prosecution was of no significance in a double jeopardy situation.

3. Appellant here also claims entitlement to relief under the double jeopardy provision in the Missouri Constitution. Mo. Const. art. I, § 19 declares that the state is prohibited from placing a person "again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury." The circumstances of this case obviously do not fall within this proscription. It has been said, however, that

(Continued on following page)

States Supreme Court has construed this language to refer to the dangers of multiple prosecution and multiple punishment for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969). That court also has addressed the question of what constitutes the same offense for constitutional purposes. Although application of the test developed in this regard has been checkered, Blockburger v. United States, 284 U.S. 299 (1932) still is the leading case. The defendant there was charged with violating provisions of the Harrison Narcotic Act. Of the five counts charged, defendant was convicted in one trial of three counts. Two of those three, he claimed, constituted but one offense for which only a single penalty lawfully could be imposed. One of those counts charged a sale of morphine hydrochloride not in or from the original stamped package, and the other charged that sale as also having been made not in pursuance of a written order of the purchaser as required by the statute. In finding two offenses, the court stated the following:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . .

Id. at 304.

The test was reaffirmed in Brown v. Ohio, 432 U.S. 161 (1977), which held that it applied to successive prosecu-

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Footnote continued—

"there is no readily discernible difference between the Fifth Amendment guarantee against double jeopardy, enforceable against the states through the Fourteenth Amendment, and the common law guarantee [against a defendant being placed twice in jeopardy] as applied in this State. State v. Richardson, 460 S.W.2d 537, 538 (Mo. banc 1970)." State v. Treadway, 558 S.W.2d 646, 651 (Mo. banc 1977), *cert. denied*, 439 U.S. 838 (1978).

tions as well as to the imposition of cumulative punishment at a single trial. The court there noted that the *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense but said, "Because we conclude today that a lesser included and a greater offense are the same under *Blockburger,* we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to . . . additional protection . . . ." *Id.* at 167, n. 6.

Thirteen days after the court handed down Brown v. Ohio, another decision was rendered on greater and lesser included offenses. That case was Harris v. Oklahoma, *supra.*

The issue addressed in *Harris* has been before this Court as well. The case urged as controlling here is State v. Chambers, 524 S.W.2d 826 (Mo. banc 1975), *cert. denied,* 423 U.S. 1058 (1976), decided before *Harris.* There defendant and a companion, after a four-hour drinking bout, stole a pickup and towed it behind a car. The vehicles weaved through both lanes of the highway and collided with an oncoming automobile, killing four persons. Chambers was convicted in one trial of one count of stealing and four counts of murder, second degree. In his appeal to this Court, Chambers challenged the submission of both the underlying felony and the murders, claiming conviction for both crimes would violate the doctrine of double jeopardy. This Court said in that regard:

> The question is now restated, whether, in the circumstances of this case, the stealing charge is an essential element of, or a lesser included offense within, the felony-murders as to bring the case within the prohibition of State v. Toombs, [326 Mo. 981, 34 S.W.2d 61 (1930)].

> The felony-murder rule permits the felonious intent necessary to a murder conviction to be shown by the perpetration of or attempt to perpetrate a felony. Proof of intent to commit the underlying felony raises a conclusive presumption that the defendant possessed the necessary felonious intent to support conviction for the resulting murder . . . . The rule does not make the underlying felony an element of the felony-murder; it merely provides an additional means of proving the requisite felonious intent for murder. (citations omitted)

Id. at 829.

The Court concluded that the two offenses "are not merged, but are separate and distinct in law and in fact."

The Court of Criminal Appeals of Oklahoma echoed these statements in Harris v. State, 555 P.2d 76 (1976), *rev'd per curiam sub nom.* Harris v. Oklahoma, 433 U.S. 682 (1977). The Oklahoma court had said:

> In the case at bar the two offenses complained of, felony murder, and robbery with firearms, are separate and distinct . . .
>
> In a felony murder case, the proof of the underlying felony is needed to prove the intent necessary for a felony murder conviction . . .

555 P.2d at 80, 81.

This language did not go unnoticed by the United States Supreme Court in its subsequent opinion and, in fact, was quoted specifically in that per curiam. 433 U.S. 682.

It is clear that after *Harris,* the underlying felony is a lesser included offense of felony murder. Respondent here contends that the Supreme Court in *Harris* meant only to address those states such as Oklahoma, whose felony murder laws require proof of the underlying felony as an

element of felony murder. No support can be found for this claim.

The law under which Harris was convicted read:

> Homicide is murder in the following cases . . .
>
> 3. When perpetrated without any design to effect death by a person engaged in the commission of any felony. Okla. Stat. tit. 21, § 701 (1971), repealed Laws 1973, c. 167 § 7, emergency eff. 5-17-73.

Missouri's statute at the time of appellant's arrest read:

> 559.007. First degree murder defined.—The unlawful killing of a human being when committed without a premeditated intent to cause the death of a particular individual but when committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping is murder in the first degree.
>
> 559.020. Murder in the second degree.—All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

RSMo 1969 (Supp. 1975).

Appellant was charged under the latter statute, under the theory resurrected in State v. Jasper, 486 S.W.2d 268, 271 (Mo. banc 1972):

> It is thus clear that Missouri recognizes the common law felony-murder rule under which a homicide committed in connection with a felony other than those enumerated in § 559.010 [Repealed L. 1975 H.B. 150 § A, § 559.007 above substituted in its place] is murder in the second degree, absent other evidence from which the jury could find the elements necessary to a finding of murder in the first degree.

A reading of the Oklahoma statute may lead one to the conclusion that it makes the underlying felony an element of felony murder. The Oklahoma Court of Criminal Appeals, however, did not view it in that manner, and the United States Supreme Court did not single out the Oklahoma statute for containing the underlying felony as an element. Rather it spoke of the use of the underlying felony to prove the intent necessary. If the Supreme Court meant to create a distinction between Oklahoma and other states on the basis of the wording of its murder statutes, it gave no hint of that in *Harris*.

This being the case, Chambers is infirm at least to the extent that it holds that a defendant may be convicted and punished for felony murder and the underlying offense, whether in one trial or two.

The second aspect of this double jeopardy question is whether *Harris* is distinguishable from this case because it involved two separate prosecutions rather than one in which the two charges were joined.

When North Carolina v. Pearce, *supra*, declared that the fifth amendment guarantee protected against three separate constitutional protections, including multiple punishment for the same offense, it was merely restating the law as it had existed since at least 1874. The court in *Pearce* quoted from Ex Parte Lange, 18 Wall. 163, 168:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Although some advocates might seek to limit *Lange* and *Pearce* to their facts, other cases reveal that such a

limitation would be unwarranted. Those double jeopardy cases which do not involve multiple prosecution or collateral estoppel must necessarily be addressing the problem of multiple punishment. *Blockburger* is an example of such a case. The two drug statutes there were determined not to be the "same," *i.e.*, that two offenses were committed even though there was only one sale. Although the court gave no indication there as to what the result would have been had the statutes been the "same" it is at the very least reasonable to assume that had they been found to be the same, that finding would have had some significance. After all, if it wasn't potentially a violation of double jeopardy to punish twice in one proceeding for the "same" offense, what could have been the purpose of determining whether the offenses were indeed the same? It is argued that the *Blockburger* test is to be used only to determine if Congress or a legislature intended that there be separate crimes. The most obvious problem with this contention is its implication that a law-making body can determine the scope of the double jeopardy clause. But beyond that flaw, there exist subsequent cases which lend no support to the theory that *Blockburger* is merely a rule of statutory construction.

For example, in Brown v. Ohio, 432 U.S. 161, 165 (1977), the court said:

> . . . the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted, the courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

In Jeffers v. United States, 432 U.S. 137, 155 (1977), the court said:

> The critical inquiry is whether Congress intended to punish each stautory violation separately. [citations omitted] . . . *If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple-punishment difficulties* . . . .
>
> As petitioner concedes . . . the first issue to be considered is whether Congress intended to allow cumulative punishment for violations of [these enumerated offenses.] *We have concluded that it did not, and this again makes it unnecessary to reach the lesser-included-offense issue.*

(Emphasis added.)

Less than a year after *Jeffers*, the court in Simpson v. United States, 435 U.S. 6 (1978), said:

> Cases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the *Blockburger* test. That test, the Government argues, is satisfied in this case. We need not reach that issue. Before an examination is made to determine whether cumulative punishments for the same offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged.

Id. at 11, 12.

These cases clearly imply that the determination of legislative intent is an exercise independent of the *Block-*

burger test, and therefore that test is not a rule of statutory construction.

These cases also suggest an alternate path this Court could follow in resolving the double jeopardy issue in this case, that is, to determine the legislative intent. Because the theory of murder in this case is based in the common law, however, and not in statutory language, such an excursion would arrive at a dead end.

Missouri's decisions on double jeopardy follow those United States cases in which multiple punishment, rather than successive prosecutions, was the issue. Two cases handed down the same day by this Court, one in division and one en banc, are in point.

In State v. Neal, 514 S.W.2d 544 (Mo. banc 1974), defendant was convicted in one proceeding of first-degree robbery by means of a dangerous and deadly weapon and assault with intent to kill with malice aforethought. The robbery alleged had occurred at a hardware store, and there were two counts of assault on two persons. After affirming the robbery conviction, the Court said at 548:

> First, the robbery in this case of Cordes Hardware by taking money from the custody of Johnnie Walton, Count I, was the result of the assault committed upon Johnnie Walton and it was the identical assault also charged in Count III. To thus split the single crime of robbery and prosecute it in Count I and a second time in Count III as an assault violated the rule against double jeopardy. State v. Richardson, 460 S.W.2d 537 (Mo. banc 1970).

In State v. Parsons, 513 S.W.2d 430 (Mo. 1974), two counts of murder were lodged against defendant, first-degree murder by inflicting a mortal wound with an explosive device and causing an explosive device to be exploded whereby the same victim was put in danger of death.

The Court found there was only one crime, despite the existence of two distinct statutes, and that conviction on both in the same proceeding violated the double jeopardy protection against multiple punishment for the same offense.

It is therefore clear that under *Blockburger* as applied in *Harris,* the felony relied on to prove intent in a felony-murder case is a lesser-included offense of the murder. Here stealing was a lesser-included offense of second-degree murder. That there should be more protection for a defendant who is doubly prosecuted than one who is doubly punished for the same offense is not supported by the cases from the United States or Missouri Supreme Court. A majority of other jurisdictions confronting this double jeopardy issue in the one-proceeding circumstance have ruled as this Court does today on the question. *See,* State v. Pinder, 375 So.2d 836, 838 (Fla. 1979); Tyson v. State, ... Ind. ...., 386 N.E.2d 1185, 1193 (1979); Mitchell v. State, ... Ind. ...., 382 N.E.2d 932, 934 (1978); State v. Frye, 283 Md. 709, 393 A.2d 1372, 1375 (1978); State v. Innis, ... R.I. ...., 391 A.2d 1158, 1165 (1978), *cert. granted on another issue,* 440 U.S. 934 (1979); State v. Briggs, ... Tenn. ...., 573 S.W.2d 157, 159 (1978). *See also,* United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979) and Harrison v. Commonwealth, 257 S.E.2d 777 (Va. 1979).[4]

One last question to be considered in this regard is the effect of concurrent sentences imposed here. The state

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4. In this Virginia case, defendant was tried in a single bench proceeding on separate indictments for capital murder in the commission of armed robbery and for robbery. The court there found no double jeopardy violation, reasoning that, unlike in *Harris* proof of the intent necessary for the defendant's murder conviction was supplied by the independent showing that the killing was willful, deliberate and premeditated. Thus it was not a case where "conviction of the greater crime, murder, cannot be had without conviction of the lesser crime [the underlying felony]." Harris v. Oklahoma, 433 U.S. at 682.

urges this Court to exercise its discretion and refuse to review any claim concerning double jeopardy by reason of the concurrent sentence doctrine.

In Benton v. Maryland, 395 U.S. 784 (1969), the court explaied the role of the doctrine at 789-90:

> One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine. [citation omitted] But whatever the underlying justifications for the doctrine, it seems clear to us that it cannot be taken to state a jurisdictional rule. [citations omitted] Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy.

The court concluded by noting the adverse collateral legal consequences of a conviction, saying:

> The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. This is not a subject we must canvass today, however. It is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions even though concurrent sentences were imposed.

Id. at 791.

The two collateral consequences mentioned in *Benton* pertain in this case as well, *i.e.*, use of all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes[5] and for the purpose of impeach-

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5. In the states of Texas and West Virginia, a life sentence is to be imposed upon conviction for third felony. *See*, Tex. Penal Code Ann., tit. 1, § 12.42(d) (Vernon) and W. Va. Code § 61-11-18 (1977).

ing his character if put in issue in a future trial. Nothing presented by the state and nothing discovered independently about this case compels this Court to invoke its discretion in this matter.

Appellant also contests the sufficiency of the evidence to sustain submission of the stealing charge to the jury. Before reaching this question, the admissibility of evidence seized from the trunk of the car after the crash must be determined.

Testimony at trial indicated that appellant and his companion were placed under arrest as soon as they were removed from their car after the crash. The evidence contested at trial was not seized until after the arrest. Although the validity of the arrests is not attacked directly in this case, their validity is of no moment here because of the rule from State v. Edmonds, 462 S.W.2d 782, 784 (Mo. 1971), restating Chambers v. Maroney, 399 U.S. 42, 51 (1970):

> . . . The right to search an automobile and the validity of a seizure are not dependent upon the right to arrest but depend upon the existence of reasonable cause on the part of the seizing officer to believe that the contents of the automobile offend against the law.

The Court in State v. Hornbeck, 492 S.W.2d 802, 805 (Mo. 1973), stated the definition of probable cause to be "mroe than mere suspicion . . . [existing] where the facts and circumstances within the knowledge of the seizing officers, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed or that the contents of the automobile offend against the law."

At the time of the search the officers knew that upon their initial sighting of appellant and his companion, the

two tried to cover their faces, that a robbery (later determined to be stealing) had been committed for which the police had issued a description over the police radio seeking two Negro males driving a white over black 1968 Cadillac, that the car that the police had been following before turning on the siren and lights matched the description issued, that the car matching the description accelerated rather than pulling over when the officers activated the siren and red lights, that during a several-block chase the Cadillac failed to stop at any stop sign or light and traveled at excessive speeds, that after the crash but before opening the trunk one of the officers noticed a carton of Kool cigarettes broken open in the seat and loose change lying on the floor and that prior to looking in the trunk one of the officers was in contact by radio with the station manager who advised that there should be more than one carton of cigarettes in the car.

These facts and circumstances meet the test set out in *Hornbeck* as to probable cause. And as stated in that case, given probable cause to search the automobile, the officers were permitted to carry out an immediate search without presenting the probable cause issue to a magistrate. State v. Hornbeck, 492 S.W.2d at 807, Chambers v. Maroney, 399 U.S. at 51. Appellant's point is without merit.

As to the sufficiency of the evidence, appellant in his motion for new trial claimed that the state had failed to prove that he had caused the death of the car wreck victim, but on appeal says the state failed to prove that he was guilty of stealing items of a value over $50. Although the latter contention was not preserved properly for appeal, it will be reviewed under the plain error doctrine, Rule 27.20(c).

In determining the sufficiency of the evidence in a criminal case after the verdict of guilty, the Court accepts as true all evidence in the record tending to prove the

defendant's guilt, whether such evidence is circumstantial in nature, together with favorable inferences that can be reasonably drawn therefrom and disregards all contrary evidence and inferences. State v. Johnson, 457 S.W.2d 795 (Mo. 1970), State v. Chase, 444 S.W.2d 398 (Mo. banc 1969), citing also from State v. Bayless, 362 Mo. 109, 240 S.W.2d 114 (Mo. 1951).

When the state's case rests upon circumstantial evidence, "the facts and circumstances must be consistent with each other and with the hypothesis of defendant's guilt, and they must be inconsistent with his innocence and exclude every reasonable hypothesis of this innocence." State v. Franco, 544 S.W.2d 533, 534 (Mo. banc 1976), citing from State v. Ramsey, 368 S.W.2d 413, 416 (Mo. 1963).

The application of this circumstantial evidence rule is realistically tempered, however, such that the circumstances need not be absolutely conclusive of guilt or demonstrate impossibility of innocence. "[T]he mere existence of other possible hypothesis is not enough to remove the case from the jury." State v. Thomas, 452 S.W.2d 160, 162 (Mo. 1970).

With these rules to guide the Court, it is clear that the evidence presented here was sufficient to support submission of the issue of appellant's guilt to the jury. As the court of appeals opinion written by Crist, J., noted, appellant's presence at the station at the time of the theft, his actions at the station, his proximity to the scene when initially spotted by the police, his behavior when spotted, his subsequent flight, his unexplained possession of the exact property stolen only moments before his arrest and his fingerprints on the stolen goods created a chain of circumstances pointing to his guilt. Moreover, the testimony of the station owner established that the value of the cigarettes exceeded $50, without considering the value of the check protector or the loose change stolen. The

trial court did not err in denying appellant's motions for acquittal.

Appellant also complains that his cross-examination of one of the police officer's present at the scene of the wreck was limited unjustifiably. Defense counsel inquired of the officer if he was aware that the victim's mother was contemplating a lawsuit against him. The prosecutor objected to the question and after a conference at the bench defense counsel indicated that he sought to get before the jury whether the officer had "a stake in the outcome" of the suit. The trial court instructed defense counsel that he would be permitted to ask "whether or not there has been any claim made against him personally, or any claims made against him personally arising out of that accident that took place on December 4, 1975. If he said, 'yes,' you may inquire as to what the claim is, and you cannot argue with him about it at all." The prosecutor's objection was sustained, and then in open court again, defense counsel asked the following:

Q Mr. Healey, has any claim been made against you personally arising out of this accident?

A Elaborate what you mean by claim, sir?

Q Certainly. Has anybody contacted you pertaining to this accident?

A Anybody?

Q Yeah. Virginia Stuckmeyer?

A She has not contacted me personally.

Q Has her attorney?

A No, sir.

Q Are you aware that a civil action is—

At this point the prosecutor objected to this question as going outside the court's ruling. The trial court permitted

defense counsel to ask the question which it had authorized earlier. Defense counsel asked, "Are you aware that a claim is pending against you arising out of this accident?" The officer answered in the negative, and defense counsel asked no more questions of him.

Appellant's precise point in this regard is that the trial court erred "in preventing defense counsel from cross-examining Officer Healey as to his knowledge that the mother of the deceased, alleged victim, was considering filing a lawsuit against the officer arising out of the accident, as such questioning would have shown interest and bias of the witness, and therefore constituted proper cross-examination."

While permissible to attempt to show a witness's interest or bias and the extent thereof on cross-examination as bearing on the credit which should be accorded his testimony, the scope of the inquiry is within the discretion of the trial court. State v. Pigques, 310 S.W.2d 942, 947 (Mo. 1958). In this instance defense counsel was permitted to ask the officer whether he had knowledge of a civil suit pending against him stemming from the death of the victim. The officer said he had no such knowledge, and questioning was ended by defense counsel. No abuse of discretion has been shown in this regard. Moreover, the limits placed on cross-examination by the trial court need not have frustrated defense counsel's effort to show bias, for once the witness denied knowledge of a suit, defense counsel was free to produce other witnesses or evidence showing the existence or pendency of such a suit. *See* State v. Pigques, *supra*.

Appellant next contends that the trial court erred in submitting a verdict director that was a fatal variance from the substitute information filed in lieu of indictment. The pertinent part of the information said that appellant

"being then and there in the perpetration of the offense of Stealing Fifty Dollars or Over, did then and there propel his automobile, at, upon and against the body of Connie Duganich, thereby feloniously inflicting a mortal wound . . . ." The challenged instruction included a paragraph alleging "that the defendant either acted alone or knowingly with common purpose together with another in the conduct referred to in the above paragraphs . . . ."

This claim is governed by the rule announced in State v. Scullin, 185 Mo. 709, 84 S.W. 862 (1905). There a similar claim was lodged, to which the Court responded that

> "the fact that the instruction tells the jury that the defendant, acting alone or with others then and there present and acting with him, did not make it any broader than the information [which charged the defendant alone with the commission of the crime] . . . It is approved practice in criminal prosecutions, where two or more persons are engaged in the commission of crime, to prosecute them jointly or severally . . . and where only one is prosecuted, it may be shown that others were present, participating in the criminal act, although not included in the indictment or information, and it is not thought that an instruction upon the same lines as in the case at bar is subject to the objection that it is broader than the information."

Id. at 863.

Accord: State v. Braddock, 558 S.W.2d 776, 779 (Mo. App. 1977); State v. Martin, 525 S.W.2d 804, 811 (Mo. App. 1975). Appellant's claim in this regard is rejected.

A modification of MAI-CR 2.70 also comes under attack by appellant. The second paragraph of MAI-CR 2.70, which was deleted in this case, reads in pertinent part: "You may find the defendant guilty or not guilty on any

or all of the counts submitted against him." The trial judge explained the modification in this way:

> The reason the court is eliminating that is under the law of this case, the jury could not logically follow that instruction because the jury cannot find him not guilty on Count I [stealing $50 or over] and guilty of Murder Second Degree on Count II. The court is not instructing the jury with respect to that because in the opinion of the court they can find him guilty on Count II for manslaughter, even though they don't find him guilty of stealing under Count I, which seems in the court's opinion to create some kind of hiatus with respect to Instruction 2.70, which is mandatory under MAI. The court is directing the circuit attorney in his argument to explain to the jury that if they find the defendant guilty of Murder Second Degree on Count II, they must first find him guilty of Stealing under Count I.

Rule 20.03(3) provides that failure to give a required instruction, as is MAI-CR 2.70, "shall constitute error, its prejudicial effect to be judicially determined." This case is not one in which the court failed to give a mandatory instruction; instead, it failed to give the *entire* instruction as set out in MAI-CR. Assuming, however, that such an omission is error, it is for this Court to determine its prejudicial effect, as well.

State v. Arrington, 559 S.W.2d 749 (Mo. banc 1978), is the most recent case from this Court on the prejudicial effect of omitting 2.70 in its entirety. In reviewing under the plain error rule [27.20(c)], the Court found no prejudice, saying:

> Upon reading all of the instructions, taken together, it is clear that the jury knew that it could find appellant guilty or not guilty on either or both counts.

> [citation]. Separate verdict directing instructions were given on the robbery in the first degree, murder in the first and second degrees and manslaughter. Each carried a tail directing acquittal if all the elements were not found beyond a reasonable doubt. Further, the jury was given six verdict forms, two of which entitled the jury to find appellant not guilty of the robbery or the homicide, plus three more verdict directing forms which allowed the jury to find appellant guilty of an offense without assessing punishment. Thereby, the jury was given every opportunity to find appellant guilty or not guilty of each offense.

Id. at 750.

The Court went on to cite State v. Boyington, 544 S.W.2d 300 (Mo. App. 1976) to the effect that the purpose of MAI-CR 2.70, as stated in the notes on use as being that separate consideration be given to each offense, had been accomplished "beyond possibility of doubt and there could be no prejudice to defendant." *Id.* at 304.

The considerations noted in *Arrington* had been set out earlier in State v. Minor, 556 S.W.2d 35 (Mo. banc 1977), another case in which no prejudice was found by the omission of MAI-CR 2.70. In the present case, separate verdict directors for robbery, murder second degree and manslaughter were given, each with a tail directing acquittal if the jury did not believe every submitted element. Five verdict forms referencing the counts and crimes were given. MAI-CR 3.02 also was given, informing the jury that they could not find appellant guilty of murder in the second degree unless they also found him guilty of stealing. The instructions, viewed in their entirety, clearly mandated separate consideration of every charge. Moreover, the inclusion of the manslaughter instruction precluded the possibility that the jury would convict on the stealing

charge only because they believed appellant was in some way responsible for the death of the victim but not guilty of the stealing. The omission of paragraph two of MAI-CR 2.70 in this case did not prejudice appellant.

In his last point, appellant claims error in the overruling of objections to testimony on direct examination by the service station attendant as to the value of the cigarettes. He admitted on cross-examination that he did not order or pay for the items. The value at issue was established at greater than $50 by the testimony of the owner of the station that he had paid $4.20 a carton. Therefore, any possible error in admitting the attendant's testimony was harmless.

Within this last point, appellant also contends that the trial court erred in refusing to declare a mistrial after sustaining his motion to strike the testimony of the station owner on the value of the check protector stolen. The owner admitted after giving a variety of estimates that he did not know the value. The trial court granted appellant's motion to strike the testimony and his request that the jury be instructed to disregard the testimony.

Mistrial, regarded as a drastic remedy, is to be granted only with greatest caution and in extraordinary circumstances. The propriety of using the remedy is lodged securely in the discretion of the trial court. No abuse of discretion was shown here, especially in light of the fact the other evidence established the requisite value for the felony stealing charge.

Inasmuch as the convictions and sentences for the greater offense of felony murder and the lesser included offense of the felony, stealing, violate the fifth amendment proscription against double jeopardy, the judgments are vacated and the cause is remanded to the trial court with

directions to enter a new judgment and sentence consistent with the views expressed herein.[6]

J. P. Morgan, Judge

Bardgett, C. J., Seiler, Welliver and Higgins, JJ., concur; Donnelly, J., dissents in separate dissenting opinion filed; Rendlen, J., dissents.

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6. The Committee on Pattern Criminal Charges and Instructions is requested hereby to review the applicable instructions in light of the views set forth in this opinion.

STATE OF MISSOURI,
Respondent,
vs.
DENNIS LEE MORGAN,
Appellant.

No. 61504

DISSENTING OPINION

The principal opinion treats the *Per Curiam* in Harris v. Oklahoma, 433 U.S. 682 (1977) as decisive here.

In my view, we are not bound by general declarations of law made by the United States Supreme Court. *See* State v. Clark, ... S.W.2d ...., ... (Mo. banc 1979) (Donnelly, J., dissenting) (No. 60221, decided December 6, 1979).

Of course, in a given factual setting, when the United States Supreme Court takes jurisdiction over the subject matter and the parties, its adjudication is the law of the case and its judgment is binding on this Court. But this is not the situation here.

I respectfully dissent.

ROBERT T. DONNELLY, Judge

APPENDIX B

Section 559.010, RSMo 1969 reads as follows:

559.010. Murder in the first degree.—Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any *arson, rape, robbery, burglary* or *mayhem,* shall be deemed murder in the first degree. (R.S.1939, § 4376)

Section 559.020, RSMo 1969 reads as follows:

559.020. Murder in the second degree.—All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree. (R.S.1939, § 4377)

Section 559.040, RSMo 1969 reads as follows:

559.040. Justifiable homicide.—Homicide shall be deemed justifiable when committed by any person in either of the following cases:

(1) In resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling house in which such person shall be; or

(2) When committed in the lawful defense of such person, or of his or her husband or wife, parent, child, brother, sister, uncle, aunt, nephew, niece, master, mistress, apprentice or servant, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished; or

(3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrec-

tion, or in lawfully keeping or preserving the peace. (R.S. 1939, § 4379)

Section 559.050, RSMo 1969 reads as follows:

559.050. Excusable homicide.—Homicide shall be deemed excusable when committed by accident or misfortune, in either of the following cases:

(1) In lawfully correcting a child, apprentice or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without unlawful intent; or

(2) In heat of passion, upon any sudden or sufficient provocation, or upon sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel and unusual manner. (R.S.1939, § 4380)

Section 559.070 reads as follows:

559.070. Manslaughter.—Every killing of a human being by the act, procurement or culpable negligence of another, not herein declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter. (R.S. 1939, § 4382)

Section 560.156, RSMo 1969 reads as follows:

560.156. Stealing—elements of offense.—1. As used in sections 560.156 and 560.161, the following words shall mean:

(1) "**Property**", everything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument and all things defined as property in sections 556.070, 556.080 and 556.090, RSMo;

(2) "**Steal**", to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing or retaining possession of his property.

2. It shall be unlawful for any person to intentionally

steal the property of another, either without his consent or by means of deceit.

3. If the property stolen within the meaning of subsection 2 is a chattel and the person charged with stealing the same proves by a preponderance of the evidence that no further transfer was made, and that, at the time of the appropriation he intended merely to use the chattel and promptly to return or discontinue his use of it, he has a defense to a prosecution under subsection 2. "**Chattel**" as used in this section does not include money, securities, negotiable instruments, documents of title, postage or revenue stamps, or other valuable papers.

4. A person who appropriates lost property shall not be deemed to have stolen the same within the meaning of subsection 2, unless such property is found under circumstances which give the finder knowledge of or means of inquiry as to the true owner.

Section 560.160, RSMo 1969 reads follows:

560.161. Penalties for stealing—fourth offense.—1. Any person convicted of stealing as provided in subsection 2 of section 560.156 shall be punished as follows:

(1) If the value of the property stolen is less than fifty dollars, unless otherwise provided herein, by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than one year or by both such fine and imprisonment;

(2) If the value of the property stolen is at least fifty dollars, by imprisonment in the penitentiary for not more than ten years nor less than two years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

2. The offense defined in subsection 2 of section 560.156 is deemed a felony regardless of the value of the property

stolen and a person convicted shall be punished as provided in subdivision (2) of subsection 1, if the property intentionally stolen:

(1) Is taken from a dwelling house or a person;

(2) Consists of any motor vehicle;

(3) Consists of any horse, mare, gelding, colt, filly, ass, mule, dog, sheep, goat, hog or neat cattle;

(4) Consists of any domestic fowl, and the same is taken in the nighttime from the messuage of another;

(5) Consists of any will or deed affecting real property, whether recorded or unrecorded;

(6) Consists of any act, bill or resolution, introduced or acted upon by the legislature of the state of Missouri;

(7) Consists of any pleading, notice, judgment, or any other record or entry of any court of this state, any other state, or of the United States;

(8) Any book of registration or list of voters required by chapter 116, RSMo;

(9) Consists of narcotic drugs as defined by section 195.010, RSMo.

3. Every person who has been previously convicted of larceny or of stealing as defined in subdivision (1) of subsection 1, three times, and who is subsequently convicted of stealing within the meaning of this section, is deemed guilty of a felony regardless of the value of the stolen property, and shall be punished as provided by subdivision (2) of subsection 1.

APPENDIX C

Section 750.529, M.C.L.A., reads as follows:

750.529. Armed robbery; aggravated assault.—Any person who shall assault another, and shall feloniously rob, steal, and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960.

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a[1], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any

term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976. No. 6, § 1, Eff. Jan. 1, 1977." [Footnote omitted.]